Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

Jose Rene HERNANDEZ
Petitioner, Pro Se

vs.

Margarita ARELLANO, individually, Julie Beth TODARO, Roberta Ivy SHAFFER, individually, Mary Lynn RICE-LIVELY, individually, John DOE, graduate student, Margaret Ann YACKEY, graduate student, Peter LARSEN, graduate student, Amy FILIATREAU, graduate student, A.J. JOHNSON, graduate student
Respondents,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

signed

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QUESTIONS PRESENTED for REVIEW

1. Does a graduate student in a public college have a constitutional or statutory right to a membership in a listserv provided by the college?

Petitioner was a member of a college listserv, (online forum), for two years prior to the alleged deliberate removal of his membership from the listserv by the Respondents in 2001.

2. Whether the Federal Rules of Appellate Procedure, F.R.A.P., like Rule 28 allows an appeals circuit to impose technical rigor on a pro se appellant?

Appeals Circuit Affirming of dismissal violates Petiioner's substantive rights because both the Circuit Panel and the district court committed fundamental error by ignoring documentary, objective evidence attached to and incorpoated in the Petitioner's complaint, in opposite to F.R.C.P. Rule 10 and a de novo review.

3. Under 28 U.S.C.§ 455, disqualification for bias, when a magistrate judge refuses removal, is there a provision that allows a moving party bringing forth a motion to disqualify a right to have a written record by the judge setting forth facts for a refusal to disqualify?

PARTIES to the PROCEEDINGS

"Petitioner"

Jose HERNANDEZ,

Hernandez is a Hispanic male, US citizen, resident of Texas; from 1999-2001 an enrolled graduate student in the library college at the University of Texas at Austin.

"Respondents"

Margarita ARELLANO, individually, (Associate Dean of Students for the University), Julie Beth TODARO, (college professor), Roberta Ivy SHAFFER, individually, (dean of the library college), Mary Lynn RICE-LIVELY, individually, (associate dean of library college), John DOE, Graduate Student, Margaret Ann YACKEY, Graduate Student, Peter LARSEN, Graduate Student; Amy FILIATREAU, Graduate Student; A.J. JOHNSON, Graduate Student, (all student association officers employed as listserv moderators and listserv owners for the library college in 2001.)

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Under the rules of review, the Petition for Writ should be granted for the reason that the court of appeals has decided an important federal question in a way that is departed from the usual course of judicial proceedings, it has also sanctioned such a departure by the district court as to call for an exercise of this Court's supervisory power.

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Fifth Amendment, right of privacy
Fourteenth Amendment, Equal Protection under the law, Due Process, right of property and liberty

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Citations to Opinions and Orders

The Order and Final Judgment, unpublished, of the district court in *Hernandez vs. Arellano, et.al.*, no. USDC 1:03-CV-317-LY, is shown at Appendix B. The Court of Appeals for the Fifth Circuit in *Hernandez vs. Arellano*, no.05-5084, (US App. LEXIS 17878) Affirming dismissal, is unpublished by local Rule 47.5 and is shown in Appendix A. Panel circuit judges Affirming the dismissal are Barksdale, Stewart and Clement. The Order to DENIED the petition for panel rehearing and rehearing En Banc is shown in Appendix A.

Statement of Jurisdiction

Panel decision of the Court of Appeals Affirming was entered on the 14th of July 2006. The court granted a timely petition for rehearing and rehearing En Banc. On the 9th of August 2006, the Fifth Circuit Appeals DENIED petition for rehearing. Jurisdiction in the lower district court is under 28 U.S.C. §§ 1331, 1343. Jurisdiction of this Supreme Court is invoked under 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions

42 U.S.C. § 1983 came onto law as § 1 of the Ku Klux Act of 1871. Section 1983 provides;

> "Every person who, under color of law of any statute, ordinance, regulation, custom or usage, of any State or Territory ... subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit equity, or other proper proceeding for redress."

The First Amendment gives U.S. citizens the right to freedom of speech and of association. The First Amendment extends to the Internet. The right of association under the First Amendment includes those organizations that conduct expressive activity. Petitioner

alleges the Respondents violated his First Amendment rights when they denied him an email membership in a listserv owned and operated by a public college in 2001.

STATEMENT of CASE

A. Factual background

In 1999 Petitioner HERNANDEZ became an enrolled graduate student in the library college and opted to receive two educational benefits provided to all students in the college of 1) an e-mail account and 2) a membership in two college listservs. Listservs are described as 'email exploders' in *ACLU vs. Reno* 929 F.Supp.824, 834-35 (E.D. Pa. 1996) aff'd., 521 U.S. 844.

The two listservs are under the control of the college. The listserv computer program is owned and licensed by the University of Texas. It is the listserv program that allows for individual college management. Daily management and administration of the listserv such as moderating posted messages is passed down to the officers of the student association of the college. The student association is sponsored by the college and is a registered association within the university. Registration allows the student association to receive benefits such as money but only if the student association agrees to comply with university regulations such as no discriminatory conduct. A membership in a listserv and a college email account makes-up an internal "mail system" provided by the college for graduate students in the library college. The college e-mail account also allows for students' personal, external use.

The college listserv, like an internal 'mail system', is intended to facilitate communication between the library college community of college faculty, the permanent staff and library college students. A listserv has been described as a 'one-to-many' email service. A listserv is much like an electronic or online bulletin board (online forum). In the Supreme Court oral arguments of *ACLU v*

Reno, the counsels described a listserv as an online newspaper where every member of the listserv is an author contributing articles for publication. A second description from *ACLU v. Reno* is that a listserv is a 'broadcasting system' where every allowed subscriber is a contributing author as well as a receiver and reader of information from everyone else's posted messages that are distributed by the listserv program to every subscribers' email address, ["one-to-many"] The email accounts and listserv are supported by the student services fees Petitioner paid with his tuition to the university. The money and benefits received by the registered student associations within the university are funded through student fees. Notably, Hernandez's membership in the two college listservs (online forums) and a college email account was personally processed and authorized by Respondent RICE-LIVELY as she was the technical supervisor for the college in 1999.

College Listserv,

For two years from 1999 to March 2001, Hernandez enjoyed and received the same educational benefits within the college as other graduate students with a college email account and membership to the listserv forum. There was never any technical disruptions or lack of service in his membership or email account until March 2001, only 24 hours after Hernandez had used his email account to send or post a message on the listserv and then received only one single reply message from a female student. In March 2001 this was the last time Hernandez was ever allowed to use the listserv forum in an unrestrictive manner as enjoyed by all the other library students. Hernandez graduated in May 2001.

After receiving only one reply from another student to his posted listserv message in late March, then no other messages posted by other college students or professors on other library topics was received or read by Hernandez as his membership to the college listserv had

ceased to exist. Hernandez later was told there was more than one reply message sent to the listserv by other students, to his posted message, but these replies were denied to him as his membership in the college listserv ceased to exist within 24 hours of his posted message.

After his graduation in May, Hernandez learns on his own that **it is possible** for the listserv administrators to use the command functions of the listserv software to remove, restrict or delete the membership of subscribers to the listserv without any notification to the subscriber or even his consent. This ability to remove subscribers is corroborated on the university website, a paper copy of which is attached in Appendix E. An email message from student witness Carlos Ovalle also corroborates this ability. Both Ovalle's e-mail message and a print copy of the website were incorporated in Petitioner's complaint.

Throughout this lawsuit and prior to, Hernandez always alleged that the removal of his membership to the college listserv and thus a denial of an educational benefit was a deliberate act by the Respondents to make Hernandez's presence in the college non-existent. By no longer able to communicate or engage in the give and take of discussions and expressive conduct within the college community through the listserv, Hernandez was completely unable to fully participate within the college as is afforded to all the other students. More importantly he was denied this ability to freely associate with other students and the college community despite having already been permitted to do so for two years prior to the unauthorized, not to mention unexplained or justified, removal and termination of his membership in the college listserv in late March 2001.

In April Hernandez makes his complaint of being denied an ability to fully participate known to Respondent SHAFFER, dean of the college. He then had his college email account also restricted and violated to the point that the Respondents deleted a weeks' worth of

his personal email messages at the end of May before Hernandez had an opportunity to retrieve them off the computer mail server owned by the university.

Denial of Listserv membership,

Hernandez was never notified about the change in his membership in the listserv in March but only weeks later found this out on his own by accident in mid-April. Once Hernandez could no longer receive the posted messages that the students and other members of the college community sent to each other via the listserv, Hernandez was forced to endure his last two months in the college as a 'non-person.' The listserv would automatically redistribute these messages to every subscriber in an efficient manner with no human intervention or effort. The student need only send one message to the listserv and the listserv would generate (post) multiple copies, one to each subscriber. But Petitioner was no longer a subscriber to the listserv he was unavailable to take part in the discussions or read the exchanged conversations on different topics about the library profession between the faculty and other graduate students or with permanent college staff. That this silencing and deliberate denial to allow Hernandez a chance to commingle within the library college community had rendered him a second-class student and was an attempt by the Respondents to force Hernandez to endure the remainder of his education in an academic and social 'vacuum.' Hernandez alleged in his suit and prior to that this animus against him by the Respondents is race and gender motivated given the severity of the act to him.

Respondents Rice-Lively as associate dean and Shaffer as dean of the college, in April, had known of Hernandez's soon graduation date was weeks away and so instead of providing him a meaningful and prompt investigation had engaged in an obstruction scheme by placing hurdles and lies and distortions to his complaints

and repeated requests for official college assistance and investigation. These lies and distortion by the defendant administrators of the college included a denial of knowing who the listserv managers were and their names, the actual abilities of the listserv command functions that allowed listowners to remove subscribed members, their refusal to identify the names of the students acting as listserv moderators. Then also a distortion of Hernandez's allegations of the removal of his membership when Shaffer and Rice-Lively informed both the college faculty and the university Ombudsman of some fabricated, fictional story Hernandez was telling. Another engaged obstruction scheme allowed by Shaffer and Rice-Lively was the removal of Hernandez's membership in a second college listserv in May. This second listserv called "mentoring" is provided by the college for library students to communicate freely only among other students enrolled in the library college.

Conduct by Respondents,

Respondents Shaffer and Rice-Lively intimidated other people in the college who might appear to be assisting Hernandez such as a female student volunteering in the college computer lab and the only Hispanic female secretary in the college who told Hernandez that "*talking to you is making my job difficult.*" Shaffer and Rice-Lively falsely informed the faculty of the college that Hernandez was making threats of violence so that this would dissuade other professors from helping him. Other conduct by Respondents is detailed in Petitioner's complaint.

In early April, dean Shaffer had unexpectedly announced to the college community, via the same listserv, that she would no longer be dean of the college as she had applied and accepted another employment out of state months earlier. Shaffer had no real intention of helping Hernandez or investigating his complaint because she was leaving on to bigger, and better things.

Hernandez included in his complaint a thorough listing of his actions and statements to Respondents together with their conduct in reaction in April, May. For example both Shaffer and Rice-Lively refused to restore Hernandez's membership in the listserv and refused him a meaningful attempt to investigate the matter when they both had the absolute authority and responsibility to do so. As state actors, Respondents Shaffer and Rice-Lively subjected Hernandez to a second-class student status and to discriminatory conduct. Shaffer and Rice-Lively as the chief administrators of the college had the power to restore Hernandez's membership to the college listserv within minutes but instead for weeks refused to do so and even denied that they had such an ability.

When Hernandez discovered the violation and alteration to his listserv membership in April he decided to inform the Office of the Ombudsman for the university and asked for their assistance. The office of the Ombudsman attempted to assist him and even contacted Rice-Lively to ask for an explanation. Rice-Lively's explanation to the Ombudsman as told to Hernandez by the ombudsman staff was vague, insubstantial and even included a claim that Shaffer herself, as dean, had approved of or had prior knowledge of the removal of Hernandez's membership to the listserv and that she, Shaffer, in some way deemed such action to be warranted or justified.

When Shaffer learns of Rice-Lively's comments she denies all of it by email message and then attempts to inform both Hernandez and the Ombudsman that she, as dean of the college, had no 'jurisdiction' of the college listserv or the student association. This is contrary to the university rules that state that a discriminatory complaint against a registered student association must be investigated by the sponsoring college. Hernandez incorporated Shaffer's email denial in his complaint together with a paper copy of Rice-Lively's comments to

the Ombudsman. The Ombudsman gave Hernandez a copy. Hernandez was dissatisfied with the progress by the Ombudsman and the college so the Ombudsman refers the matter to Respondent ARELLANO, the associate dean of students for the university.

ARELLANO provides Hernandez with only limited assistance and begins 'foot-dragging' herself as she refused to accompany Hernandez to the college to speak with Shaffer. Arellano did not meet personally with the college but only exchanged email messages or spoke to Shaffer by phone. Arellano's inaction becomes a paralysis to Hernandez's attempt to have his complaint investigated to the point that Arellano, using her office and position as a state actor, intimidates him and finally threatens his career by informing him that he "*will not receive references*" for employment once he graduates. Arellano told Hernandez the story of 'no on likes it when you rock the boat.' After Arellano threatens his career she asked him what he wanted and Hernandez asked that an apology be given to him from Respondent TODARO for the violation to his listserv membership. **Arellano agrees**, or gives the impression that she will get this apology from Todaro and then deceives Hernandez into believing that there are other options to proceed in his complaint against the college if no apology is given. The next day Arellano phones Hernandez and tells him he will receive no apology from Todaro. On May 23, Arellano informs Hernandez not to return to the college or her office to ask for further assistance specifically because none will be given. That neither she, the Office of the Dean of Students, the Ombudsman or anyone from the college would speak to him and that dean Shaffer had labeled Hernandez 'persona non-grata.' Arellano informed Hernandez he will receive no apology from anyone at the college, that in essence that he should go away and not come back. All of these events were detailed in his complaint with the district court.

Hernandez meets Todaro,

In February 2000, Hernandez was in a course taught by Respondent TODARO. This is the start of the basis of Todaro's animus against him. Hernandez made the honest mistake of telling Todaro that her close friend Ms. Polk mismanaged his practicum. For his degree, Hernandez must complete a practicum course. Ms. Polk is employed with the local school district and manages the practicum assignments. Hernandez had no idea of Todaro's dedication to Ms. Polk. Todaro did her practicum under Polk in 1974. This dislike for Hernandez by Todaro is the basis for her attempts to blackball and ruin his career in the library profession to the point that it was Todaro who instigated the violation of Hernandez's college email account and the removal of his membership in the college listserv in March 2001 by asking one of the graduate student defendants to remove his membership. Hernandez only learned of Todaro's involvement in May after being informed via email anonymously by someone in the college. There were other prior attempts by Todaro to retaliate against him like when she refused to return his research paper for six months while other students got theirs in two months. Todaro would disparage Hernandez's abilities to other students and openly ridicule his professional potential. In April 2001, Todaro learns of Hernandez's complaint from Shaffer and then attempts to intervene and circumvent the investigative process by meeting with Arellano in order to falsely gain her confidence and then turn her against Hernandez. Todaro makes the fatal mistake of telling Arellano that she does not know Hernandez personally and that she could not identify him. But Hernandez tells Arellano otherwise, that Todaro and Hernandez know each other well, and so Arellano then realizes the truth and understands that Todaro and Shaffer were deliberately hiding information and giving false distortions about his situation. This is why Arellano agrees to ask Todaro apologize Hernandez.

Todaro corroborates her involvement in Hernandez's practicum situation in a email message of which a copy was incorporated into his complaint in the lower courts.

Retaliation after graduation,

In May 2001, over the Memorial holiday, Petitioner emails the entire college community with his Internet email accounts like Hotmail to describe his situation and allegations and asks for assistance from the college faculty to help resolve his complaint but instead receives no official or unofficial response from anyone that gives any impression they are willing to assist him. One professor, Julie Hallmark, meets with Hernandez and tells him to "*hey, just get over it.*" No other professor was willing to speak to him even though his email message threatens legal action. In retaliation for this email letter by Hernandez to the entire college, the Respondents delete a week's worth of his email messages from his college mail account before he can retrieve them off the server at the beginning of June.

In October, Hernandez contacts the Ombudsman and Arellano to ask for a copy of his documents and any other paper materials concerning his allegations. Hernandez asks Arellano for a written, letter summary to explain his situation of how or what service was given to his request for assistance. Arellano provides Hernandez with an official letter with University seal but the letter contains only half of the true events that transpired in April and May and has no mention whatsoever of Todaro's involvement. Arellano signs her legal, official title on the bottom of the letter. A copy of Arellano's October letter is shown in Appendix E.

After this meeting in October with Arellano, the Respondents like Todaro engaged or paid others to continually stalk and harass Hernandez at his part-time library job and also when he moves to San Antonio in 2002. Then still more harassment when he briefly gains

federal employment in Kansas City in 2003. The stalking and harassment was intended to deny Hernandez access to his day in court and an ability to retain legal counsel. The harassment was intended to deny him contacting witnesses or continue investigating his situation.

Petitioner secretly tape-recorded Arellano's threats to his career in May 2001 and her agreement to have Todaro apologize for the violation to his membership in a college listserv. Hernandez filed his lawsuit pro se and had the tape recordings transcribed by a professional court report who affixed an affidavit and seal to the transcript. Hernandez incorporated this transcript and made specific references to it in his complaint but both the magistrate judge and the district judge had not one single mention of the transcript in their court rulings.

Neither did the appeals Panel make any reference to the transcript or to any of the other documents, papers and evidence that Petitioner submitted in his complaint that corroborates his situation such as words and statements made by the Respondents. One important example is Arellano's letter to Hernandez in October about his allegations against the college and the failure of the college to resolve the matter. Shown on the tape transcript is Arellano clearly telling Hernandez that there will be repercussions to his career, that his professional career after graduation will suffer.

True to Respondents' threats Hernandez is driven from his last library employment. He has not been able to gain any new employment in any other library position. He has been forced to default on his student loan of $38,000 and have his wages garnished. Then have his credit, his reputation and his life ruined because the Respondents refused to assist him in 2001 when they had the means, authority and responsibility to hold Todaro responsible for her actions to Hernandez.

Listservs generally; The last two documents in Appendix E are copies of websites giving a self-description of the college listserv. A general description of listservs is given in *ACLU v. Reno* 929 F Supp. 824, 834-35 (1996), is instructive; (citation is from *Barratt v. Catacombs Press* 44 F Supp. 2d 717 (E.D. Pa. 1999));

> "One-to-many messaging. The Internet also contains automatic mailing list services (listservs), ['mail-exploders'] that allow communications about particular subjects of interest to a group of people,... people can subscribe to a "listserv" mailing list on a particular topic of interest... The subscriber can submit messages on the topic to the listserv that are forwarded (by e-mail), either automatically or through a human moderator overseeing the listserv, to anyone who has subscribed to the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. This service provides the capability to keep abreast of developments or events in a particular subject area. ...Users of "open" listservs...can add or remove their names from the mailing list automatically with no direct human involvement ... Listservs may also be "closed", only allowing for one's acceptance into the listserv by a human moderator." [emphasis]

Petitioner Hernandez was never able to gain such description about the college listserv from Respondents in 2001. Nor would they admit to Hernandez whether or not the college listserv was 'open' or 'closed.' Shaffer and Rice-Lively deceived Hernandez and pretended that the listserv does not have any human moderators. Also pretended no software allowed the removal of members.

The graduate student Respondents are the human moderators and the listserv owners in 2001. When Hernandez emailed the faculty of the college and most of the college students to explain his situation with the treatment he received, he was specific enough to include Arellano's words to him but still no one from the library college offered him any assistance. The obstruction scheming by the Respondents Shaffer and Rice-Lively to isolate Hernandez was so complete that when he attended the graduation ceremony, he was shunned and avoided by everyone else as though he had the plague.

US Dept. of Education

Petitioner filed a charge against the college with the Dept of Education, Office of Civil Rights (OCR), Dallas division but did not receive any assistance or investigation. In 2002 Hernandez learns from local and national newspaper articles the OCR was in fact already investigating the university when a female student had filed a complaint alleging (1) discriminatory conduct and (2) a deliberate, "foot-dragging" inaction by the university. The female student was in a different college than Petitioner. When the OCR administratively closed his complaint, Hernandez sought a review of the Dallas decision by writing a request to the Dept of Education in Washington, D.C., along with a same request asking for a review to the Secretary of Education, the Deputy Assistant, and the Dept. of Education Inspector General. The attached letter in Appendix E is the response from the Dallas OCR and Hernandez never received any other response from the others mentioned above.

The OCR office states it followed "policy procedure" but near as Hernandez can guess, the OCR didn't investigate his complaint because they, OCR, required him to first prove that Arellano had threatened his career because of a race or gender animus or motive. Hernandez requested to meet the OCR personnel in Dallas so he could play the tape-recorded conversation of

where Arellano threatens him in her office, but the Dallas office refused such a meeting. The university newspaper article describing the OCR investigation in 2002 specifically named Arellano's place of employment at the Office of the Dean of Students as the university office that the female student alleged was 'foot-dragging', or unresponsive to her discrimination charge. Both this newspaper article with one from the Chronicle of Higher Education were incorporated in Petitioner's complaint.

B. Proceedings of suit,

The district court dismissed Hernandez's complaint at the pleading stage by imposing heightened pleadings. Magistrate's Report does not discuss the documentary evidence attached to his complaint. The complaint is more than 100 pages with incorporated attachments. Half of the complaint is in narrative form, the other with numbered paragraphs. Both the magistrate and the district judge did not make one single reference to the narrative portion of the complaint. The district judge did not engage or discuss a single issue from Petitioner's Objections to the Report. No case is cited as authority to say Petitioner has no right to a college email account. When Hernandez appealed the dismissal as a pro se appellant, he raised multiple issues for review. But the appeals court imposed technical rigor and affirmed the dismissal while ignoring or failing to mention all the documentary evidence incorporated with the complaint. This in opposite to the meaning of a "de novo review." The Panel opinion stated that Hernandez was required to brief the issue on the omission of the documentary evidence under one specific subheading rather than briefing the issue under a second subheading. This second subheading issue was of disqualifying the magistrate for bias. Under this second subheading, Hernandez **did brief** the magistrate's failure to reference or take note of the attached, incorporated documentary evidence, adjacent, behind the complaint.

District chief judge Yeakal, in the Order and Final Judgment dismissing the complaint, made no attempt to clarify the law or provide one single citation to a legal case of authority. The lack of an elaboration of law or clarifying the legal basis by issuing a memorandum of law made the appeal more difficult for Petitioner. It was his pro se status that allowed the district court to ignore the narrative portion of his complaint.

Capacity of Respondents, defendants

Prior to this instance case, Hernandez filed a Motion To Perpetuate Testimony but it was dismissed in June 2003. Hernandez filed this instance case pro se in May 2003. In this instance suit the description of the defendant parties did not identify or specify the capacity of all the defendants. Hernandez was not sure what their capacity was either as 'officially' or 'individually' in terms of what violations of law were alleged against each defendant. Petitioner has never received legal training to become an attorney. That Hernandez is pro se with no one to assist him, the defendants used legalese tricky against him and denied him discovery. Examples of the lower courts' departure from the usual course of judicial proceedings is as follows.

Qualified Immunity,

The Respondents asserted qualified immunity but failed to demonstrate their entitlement or meet their burden of demonstrating their claim to immunity. Hernandez objected and timely filed this argument with the district judge to over-rule the magistrate's granting of qualified immunity, limiting discovery and ordering a Rule 7 Reply complaint. The district judge affirmed the magistrate's grant of qualified immunity to the defendants. Hernandez argued that the defendants had asserted immunity with only one sentence in their motion, filed 21 Aug 2003, by saying on page 2, quote;

"Claims 2. The Defendants are each entitled to

qualified immunity from all claims brought through 42 U.S.C. § 1983 against them in their individual capacities."

Hernandez objected to this motion arguing that nowhere in the motion did the defendants state if the graduate students were state actors and did not clearly explain if any of the defendants were acting within their discretionary employment duties. The district judge allowed the order limiting discovery and the order to file a Rule 7 Reply even though Hernandez had listed specific allegations and sufficient factual information in his complaint to give the defendants a clear notice of the claim and circumstances of what each defendant is alleged to have done in violation of constitutional and statutory law. The magistrate's Report grants immunity.

But in district court document # 29, filed 03/16/04, the magistrate's Order on page one, top paragraph, states;

"Defendants have not to date, however, sought a definitive ruling on their entitlement to qualified immunity. Rather, they have merely asserted the defense as a matter of an initial response. The Court is not, therefore, in a position to determine the merits of the issue of qualified immunity at this time."

Magistrate's Report,

On page eight, the top paragraph, the magistrate states;

"At no point in his complaint, however, does he make any specific allegations which identify who committed the 'violation,' when precisely the 'violation' occurred, how the 'violation' occurred, or even what the precise nature of the 'violation' was. Hernandez has, therefore, failed to state factual allegations against Defendants sufficient to support a claim of a First Amendment violation."

In a Rule 12 motion to dismiss, Hernandez is suppose to be given the benefit of doubt in all well-pled allegations.

Petitioner is easily capable of describing the who, what, when and how aspects of his complaint as shown above.

Moreover, Hernandez included, referenced and incorporated significant documentary evidence that corroborates some of the factual allegations. These documents were ignored by the magistrate in his Report. At the bottom of page eight in the Report the magistrate includes a footnote #3 where he states that...

> "...Plaintiff [Hernandez] has made a significant number of additional accusations of wrongful conduct on the part of Shaffer,... However, he has failed to make any allegations that these wrongful acts were ever directed at or affected him."

But the magistrate's Report does not discuss or explain why or how these 'wrongful acts' by Shaffer are not important to the lawsuit. The magistrate abused his position to summarily ignore and waive issues raised by Hernandez in his attempts to meet the specificity required in a Rule 7 Reply. Magistrate, by this omission, together with the failure to notice or refer to the attached documentary evidence, along with his failure to accept all well-pled facts as true is proof of his bias. Hernandez timely filed a sufficient motion to disqualify the magistrate for bias before he actually received the Report. After receiving it, Hernandez added other examples of bias in a Supplement Motion. The Final Judgment to dismiss denied the motion to disqualify but gave no reason or basis. The district judge's statement that Hernandez "solely" based his disqualification on the Report is false and wrong. The accusations listed against Shaffer in magistrate's footnote 3 involve her refusal to investigation or give meaningful assistance to Petitioner. Other accusations against dean Shaffer involve how the college manages the listserv. These two issues are obviously significant to the lawsuit. Lower court cited no case on point to argue Hernandez has no right to an email account in a public college or listserv membership.

Fundamental Error,

Obviously the tape-recorded transcript would corroborate that Respondent Arellano believed Todaro was responsible enough or had direct involvement in the removal of Hernandez's listserv membership. Enough so that she agreed in May that she would ask Todaro to apologize to Hernandez for her involvement in order to bring about some final resclution to his situation. Judge Yeakal gave no review or discussion of Hernandez's alleged factual background from the court complaint.

The appeals court also ignored the attached documentary evidence. Panel opinion states Hernandez failed to properly brief this issue of failure to notice the incorporated documents. The appeals court's position is misapplied as they are responsible for giving a constitutional lawsuit, like Hernandez's, a plenary or de novo review. Panel must not give deference to the district court and repeat the same error or omission.

Other issues,

Hernandez filed his motion to disqualify the magistrate prior to receiving the Report. He included the magistrate's denial of a court appointed counsel which was by stating the lawsuit was plain, uncomplicated and "straight forward." Also in the motion was the magistrate's refusal and denial to Hernandez's request to have the district court supervise the pre-trial conference. This denial based on the defense counsel's assertion that Hernandez's motion was "without merit." Neither defense counsel nor magistrate defines or explains why a motion to supervise is "without merit."

The dismissal of Hernandez's complaint at the pleading stage was premature. A motion to dismiss on the pleadings alone, at such an early stage, requires that the material allegations by the nonmovant Hernandez are taken as admitted as true by the moving party, the Respondents. see *Jenkins v. McKeithen* 89 S.Ct. 843, 395

395 U.S. 411 (1969). Under a Rule 12(b)(6) motion it is reversible error to exclude affidavits incorporated in a complaint which show a trial able issue of fact exists. see *Freeman v. Marine Midland Bank- New York* (1974 CA2 NY) 494 F.2d 1334. The magistrate's Report stated different facts and descriptions of events that are opposite to those in which Hernandez alleged in his complaint. One specific example has the magistrate asserting that Arellano did not agree to ask or make Todaro apologize to Hernandez despite evidence proving to the contrary in the transcribed tape-recorded conversation. The transcription was made by a professional court reporter who had affixed an affidavit and seal attesting to the authenticity of the transcript. The transcript was incorporated to the Reply complaint.

Hernandez made a motion to amend his complaint so he could add the university as a defendant. This would have made some of the Respondents sued in both their official and individual capacity. The technical purpose of a having a clear statement of 'capacity' is to determine whether a party can be sued and capacity should not be used to determine if a violation has occurred. District judge gave no legal basis to deny the motion to amend.

Proceedings of Fifth Circuit.

Panel Opinion was a short document that was only two pages, (third page is the caption), and had only five cited case authorities despite the nine issues raised for review by Petitioner. The Panel opinion does not even say that Hernandez is given a 'de novo' review and Hernandez posits that he did not get a review anew with no deference to the district court's ruling.

Panel's cited authorities

Of the five cited authorities by the Panel opinion, only two are First Amendment cases. A third is about disqualification of a judge for bias, a fourth is on the F.R.A.P. 28 failure to brief waives issues and the last cite

is misapplied here because that cited authority had facts and circumstances opposite of Hernandez. Specifically the Panel's cited case was not about a pro se plaintiff nor was it about being denied discovery as Hernandez alleges he was denied but instead the Panel's cited case had experienced counsel and conducted "extended discovery." That counsel had warning by district judge that there is no 'cause of action' in their alleged facts.

Panel's cited authority for the issue of disqualification is improperly applied and a confusing citation because the Panel attempted to argue that Hernandez's issue of disqualification was "frivolous." But the Panel's cited case, *Liteky v. United States* 510 U.S. 540 (1994), gives no definition nor does it make a single description or reference of what is meant by "frivolous." The word frivolous is nowhere in the *Liteky* case, neither in the majority nor the dissenting opinion.

Hernandez argues the two Panel cited cases are misconstrued or a distorted application of legal analogy. These two cases involve First Amendment issues but neither has anything to do with a college setting or for that matter with email accounts and absolutely nothing about a listserv. Hernandez believes the Panel acted outside the normal judicial proceeding in making or defining law about an important First Amendment issue with a misplaced, faulty analogy. This is an example by Petitioner of a bad analogy to make a flawed legal point;-

> "It is established that there are free speech restrictions on military installations, therefore Hernandez has no free speech right in a public college outside the same military restrictions."

Panel opinion applied a similar analogy to argue Hernandez has no right to a listserv in a public college. This is faulty reasoning because the two places are different settings from a college. The Panel opinion used a bad analogy to argue Hernandez did not state a claim

of a violation that warranted relief in federal court. In a normal proceedings it is the facts, circumstances and intent of the forum in question that determines whether Hernandez has a legal right to the college listserv. Not an arbitrary, ill-conceived analogy by the circuit Panel.

What is relevant about the two cited First Amendment cases by the Panel is that both of those cases dealt with a state related forum or state property and both of those cases were allowed to run the full fanfare of a lawsuit with discovery and most importantly, both cited cases were given a forum analysis. Hernandez's complaint was not given a forum analysis; was denied discovery by the defense counsel and was refused court appointed counsel first by the magistrate and then again by the district judge.

F.R.A.P. 28, Briefed issues

Panel's opinion about the waiver of issues because of failure to brief is also a misapplied citation. The case cited by the Panel was of a pro se convict appeal. The convict attempted to exceed the page limit on his brief by attaching his district court complaint. That Panel in the convict's appeal cited authority denying such an abuse by the convict and struck the attached complaint to limit the page number on his brief. That circuit judge then determined a failure to brief the issues were waived under F.R.A.P. Rule 28. The issues raised by the convict were nowhere within the four corners of his brief. But in Petitioner's appeals brief, he did not exceed the page limit, he did in fact brief within the four corners the issue of documentary evidence attached to his complaint but ignored by the lower court. Hernandez simply did not brief this particular issue under one specific subheading that the Panel required of him. Panel misconstrued that he did not fully brief the issue which makes it waived. But Hernandez **did brief the issue** of the magistrate's failure to reference or notice the documents under the subheading of the magistrate's bias

against Hernandez. Panel, however, argued Hernandez did not brief this issue properly in a manner they required, in opposite to the guideline of the F.R.A.P. 28 within the four corners of a brief. Both the district court and the appeals Panel did not give pro se Hernandez the liberal construing of his complaint and his brief. The lower court did not draw all inferences in his favor as the nonmovant in a Rule 12 motion. And did not accept as true all well-pled allegations. Neither the district judge nor Panel gave Petitioner Hernandez a de novo review.

REASONS for GRANTING WRIT

I. Waived Issues, F.R.C.P. 10, 12 and F.R.A.P. 28

The district court and the appeals circuit committed fundamental error by ignoring documentary evidence and materials attached to and incorporated in Hernandez's complaint. The F.R.C.P. Rule 10(c) states that "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purpose." The same is said in the *Federal Litigation Guide*, 2006 by Matthew Bender, Chapter 13 Rule 12 Motions, quote;

> "P 3.93 Materials Considered by Court. [1]--Pleadings and Matters. A Rule 12 (b)(6) motion is addressed to the face of the pleadings. A court may consider the pleadings, **documents referred to in the pleadings**, and matters of judicial notice... motion to dismiss. (*Stahl v. USDA* 327 F.3d. 697, 700-1 (8th 2003)." [emphasis added]

Moreover, the *Federal Litigation Guide* continues quote;

> [2] - Materials Court May Consider Without Converting Motion. Unless the court converts...to a motion for summary judgment, the court may consider only the following materials;...
> - Facts alleged in the complaint
> **-Documents attached as exhibits to complaint** (*Taylor v. Appleton* 30 F.3d. 307, 308-9 (2nd 1994)
> -Documents that have not been attached to the

complaint or incorporated by reference if the complaint **relies heavily** on the documents and the **documents are integral** to complaint. [emphasis]

Petitioner also asks the Court to take notice of *Moore's Federal Practice- Civil*, 2006 by Matthew Bender Comp., vol. 2: Analysis: Rule 7-12 Chpt 10 Form of Pleadings; §10.05 Exhibit to Pleadings is Part of Pleading, quote-

[1] -...A **copy of any written instrument** that is an exhibit to a pleading becomes part of the pleading for all purposes. [emphasis added]

[2] -Types of Written Instruments Permitted as Pleading Exhibits. Among the varying types of written instruments permitted as pleading exhibits are...deposition transcripts, **letters of correspondence**, (*Webster v. New Lenox School Dist.*, 917 F.2d. 1004, 1005-6 (7th 1990). [emphasis]

[3] -Guidelines for Attachment of Pleading Exhibits. Rule 10(c) is silent on how exhibits are to be attached, numbered, and sized.

[4] -Unattached...A written instrument not formally attached to a pleading that is offered **in opposition to a motion to dismiss the pleading** may be considered by the court deciding the motion, if there was **a "clear and definite reference"** to the instrument in the pleading. (*B.B Optische Industrie v. Hologic* 909 F.Supp. 162,167 (S.D. N.Y.1995)

A pro se plaintiff in a federal suit against state actors should not required to be proficient in the litigation process or be required to inform the court of such before the court actually gives plaintiff the proper process. A liberal construing of a pro se document includes his appeals brief even under F.R.A.P. 28. The Fifth Circuit has ruled as such for a general liberal interpretation of an appeals brief with counsel in the following cases:

(1.) *Kincade vs. General Tire and Rubber*, 635 F.2d 501, (1981 US App. LEXIS 20536) quote; "As a general rule,

briefs are read liberally with respect to ascertaining what issues are raised on appeal;..."

(2.) *Atwood, et.al., vs. Union Carbide*, 847 F.2d 278, (1988 US App. LEXIS 8405), "We **liberally construe briefs** in determining issues presented for review."

(3.) *SEC vs. Sam Recile*, 10 F.3d 1093, (1993 US App. LEXIS 33899), "We **liberally construe briefs** in determining issues presented for review."

(4.) *U.S. vs. Rosalinda Miranda,* 248 F.3d 434, (2001 US App. LEXIS 6473), Fifth Circuit judge Parker stated;

> "Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue. However, the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion ... We may consider such an issue, particularly where substantial public interests are involved. ... **Moreover, we must liberally construe briefs** in determining what issues have been presented for appeal." [emphasis added by Petitioner]

The Panel judges of Barksdale, Stewart and Clement, abused their discretion and departed from the usual course of normal judicial proceedings in not giving Hernandez a liberal construing of his appeals brief.

II. 28 USC § 455, Denied Motion to Disqualify

Disqualification under §455 ensures the appearance of judicial integrity because it serves as an avenue of relief for a party that believes the court has become bias. Hernandez believes the magistrate become or showed his bias against him or his complaint and timely raised his concern by filing a motion to disqualify listing the allegations. The district judge denied motion and made a factual error by stating the motion to disqualify was solely based on the Report when in fact the motion was filed prior to the issuance of the Report. The Panel affirming the denial gave a less than substantial reason

and only added confusion with a flawed citation. Petitioner has yet to receive a fair and complete review on the motion to disqualify. It is not the actual proof of bias; .."what matters is not the reality of bias or prejudice but its appearance." *Liteky v. U.S.* 570 U.S. 540, 548 (1994). In every rulings or Report by the magistrate, it was always against or disadvantaged Hernandez or his suit. In *Liteky,* a similar example is given by Justice Scalia, (majority opinion), where a jury member who always votes for the defendant party may be viewed as bias but not the jury member who always votes for the merits of a case. After receiving the Report, Hernandez was able to add other allegations of bias.

III. Contours of Right, determination of

The issue of whether Petitioner has a right to an email account in a public college is an important issue. The Fifth Circuit said as much in *White Buffalo Ventures vs. University of Texas at Austi*n, 420 F.3d 366, no. 04-50362 (2005). On the first paragraph, that Panel stated;

> "White Buffalo sought to enjoin UT [university] from excluding its incoming mail [sent to staff and students] ...this case presents several novel issues, the significance of which will grow proportionally with heightened cultural and economic reliance on the Internet, we affirm."

Hernandez filed his suit in 2003 in the same district court as *White Buffalo* did, only seven days apart. When *White Buffalo* filed a Motion for Summary Judgment against the university it stated as an argument that the university, through depositions and discovery, had admitted and supported the idea that the faculty and the students have a First Amendment right to the email accounts the university provided as well has a right in the use of a university email account for personal use. [see *White Buffalo* document #38, page 5, filed 02/13/04] If this First Amendment right is supported as a right or

privilege by the university in *White Buffalo,* then Petitioner has a right to receive those sent email messages from students in the college. This means Petitioner's denial of a membership in the college listserv did state a claim of a constitutional violation. The right to receive information is precedent under *Lamont vs. Postmaster General* 381 U.S. 301 (1965). The National Archives and Records Agency, NARA, catalogs a sent email message as a 'record', like a paper record. Also a constitutional precedent is that "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them", *Board of Education vs. Pico* 457 U.S. 853, 867-8 (1982) (plurality opinion).

A right or a privilege is recognized when a showing is made to its entitlement by a contract or statutory code, rather than having a unilateral expectation of it, see *Board of Regents vs. Roth* 408 U.S. 564 (1972). Hernandez claims a right and entitlement under the state Texas Statutory Education Code (amended 1995), specifically, Title I General Provisions, §§ 1.001, 1.002, Title II Public Education, Mission Objectives. and Title III Higher Education [quoted portions in Appendix D] In the Title III Higher Education, it lists the University of Texas at Austin [UT] as an institution subjected to the Education Code. From Title I, Chapter 1 General Provisions, sec 1.001 Applicability (a) it is stated;

> "This code applies to all educational institutions supported in whole or in part by state tax funds unless specifically excluded by this code."

Importantly relevant, in §1.002 Equal Educational Services and Opportunities (a), Chapter 1, it states;

> "An educational institution undertaking to provide education, services, or activities to any individual within the jurisdiction or geographical boundaries of the educational institution **shall provide equal opportunities to all individuals** within its jurisdiction or geographic

boundaries pursuant to this code." [emphasis]

Both UT and the college are supported by state tax funds and are subjected to the Texas Education Code and are required by state statute to provide equal opportunities to all students like Hernandez in 2001. Moreover, in Title II, subtitle A. General Provisions, chapter 4 Mission, Objectives, and Goals, § 4.001 states,

> "The mission of the public education system of this state is to ensure that all Texas children **have access to a quality education that enables them to achieve their potential and fully participate now and in the future** in the social, economic, and educational opportunities of our state and nation." [petitioner's emphasis]

When Hernandez was denied an education benefit or service provided to all students in the college in 2001 like an email account and membership in the listserv, he was denied access to a quality education and an equal opportunity to fully participate within the college. Then later denied a benefit in pursuing a chosen profession free from state interference. A similar determination of denial to a quality education was made in *Riggan v. Midland ISD* 86 F.Supp. 2d 647, 654, (US Dist. LEXIS 2639) (W.D. TX 2000). Riggan, a white male high school senior was 'denied' contact with teachers and students for 8 days during a suspension pending a determination of violations of school regulations. That district court ruled Riggan's denied contact in school was a denial of a "quality education" right under Texas statutory code.

Hernandez, a Hispanic male, was denied two months of a full educational process and interaction with other library college students in his last semester by the white female Respondents in 2001. By the tuition Hernandez paid and the university catalog, he had an **implied contract** with UT to be treated fairly and equally like other graduate students in the library college in 2001.

In a constitutional-tort suit with qualified immunity issues, the first step the court does is determine if a right has been violated or if the contours of a right were reasonably established that a state official would know they were violating a right. see *Conn v. Gabbert* 119 S.Ct. 1292 (1999), *Wilson v. Layne* 119 S.Ct. 1692 (1999). One secondary source said that the court *must* use this approach. see Friedman, Symposium Practising Law Institute: *Qualified Immunity When Facts are in Dispute.* 16 Touro Law Review 857 Spring 2000, page 858-9. The Fifth Circuit followed this process in *Chiu vs. Plano* 260 F.3d 330 (2001) (by Chief Justice King) quote;

> "B. First Amendment Forum Analysis....our determination of the character of the forum in which expression was regulated shapes our determination whether a clearly established right existed and our ultimate conclusion whether a constitutional violation occurred."

The two cited authorities from Panel's opinion involving a First Amendment issue did have discovery and a forum analysis. In this instance case, Petitioner did not receive any determination as to whether a contour of a right was clearly established nor was he given a forum analysis by the district court or appeals circuit. Hernandez was denied under a Rule 12 to have his version of well-pled allegations taken as true or deemed admitted by defendants. Hernandez was denied the objective documentary evidence incorporated in his complaint which corroborates his allegations. This 'objective evidence' is described in the dissent opinion of *Crawford-El v.Britton* 523 U.S. 574, 612 (1998). The objective evidence like the tape recorded transcript of Hernandez's conversation with Arellano shows that she knew she was violating his rights or privileges when she told Hernandez he would need to sign a nondisclosure agreement in order to receive Todaro's apology for the removal of his membership in a college listserv.

It is well established that a school or state institution could create a forum from state property or school facilities, see *Perry Education Assoc. v. Perry Local* 460 U.S. 37, 103 S.Ct. 948 (1983), *Widmar v Vincent* 545 U.S. 26, 102 S.CT. 269 (1981). Once a state or school creates a forum, an admitted member to the forum may not be excluded without reason or justification, "unless the exclusion is necessary to serve a compelling state interest." *Cornelius vs. NAACP* 473 U.S. 788, 800, 105 S.Ct. 3439 (1985). It has also been possible to delete email messages and remove a membership from a listserv once a party is in possession of a computer that is being used to store those messages, this possibility stated in part in *ACLU vs. Reno* and in *Steve Jackson Games vs. United States Secret Service*, 36 F.3d 457, (1994 US App. LEXIS 30323) (5th) So Hernandez's claims of having his membership removed from a listserv is known to be possible and is not a conclusory allegation as the Panel and magistrate have stated.

CONCLUSION

A pro se plaintiff complaint should not be dismissed in such an early stage of litigation by imposing a heightened pleading burden. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct. 992 (2002).

The Fifth Circuit does not recognize *Swierkiewicz*, see *Gonzalez vs. SAWS San Antonio Water System*, no. 04-CA-218XR (2004 US Dist. LEXIS 21922), states;

> "The Fifth Circuit has not had occasion to consider whether its 'heightened pleading standard' in section 1983 cases involving qualified immunity was affected by *Swierkiewicz*, ... Because *Swierkiewicz* did not involve qualified immunity and does not directly overrule *Schultea* [*vs. Wood* 47 F.3d 1427 (5th Cir. 1995)], this Court will continue to apply *Schultea* framework until the Fifth Circuit or Supreme Court directs otherwise."

Now is the time with this instance case with the Petition for Writ can the Supreme Court inform the Fifth Circuit of otherwise. The Fifth Circuit has always imposed hurdles or other barriers against plaintiffs in suits against state actors or institutions for constitutional violations. see *Roadblock: The Fifth Circuit Further Insulates Public School Systems from § 1983 Liability,* by Monica Hof Williams, 43 Loyola Law Review 649-78 (1998). The district court dismissed by applying heightened pleadings even though the defendants failed to meet their burden of demonstrating their entitlement to qualified immunity. The circuit court imposed technical rigor on Hernandez's appeals brief. Petitioner requested a court appointed counsel and was twice denied. Defense counsel argued the federal rules of procedure were enough aide to Hernandez. Petitioner motioned to have the district court make the defense counsel give him a pre-trial conference so that discovery could commence but was refused by the magistrate. A discretion of a district court to control its docket cannot be used to "undercut potency of discovery control measures, including Rule mandating holding of discovery conference upon proper motion by party," see *Union City Barge Line vs. Union Carbide Corp.,* 823 F.2d 129 (5th Tex. 1987). For all the reasons above this Petition must be **Granted** in order to **Vacate** and **Remand** the lower courts' judgment made outside of normal judicial proceedings and opposite to Supreme Court precedent. A upholding of the dismissal only rewards the Respondents' conduct in 2001. The lower courts did not make one single factual determination. Personal choices like a professional career and a self-defining association are the essence of a liberty right.

Respectfully Resubmitted _____

PETITIONER, Jose Hernandez
231 Wallace Rd,San Antonio, TX 78237
(210) 434-1424, December 2006

Supreme Court, U.S.
FILED
(2)
06-957 NOV 04 2006
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

Jose Rene HERNANDEZ
Petitioner, Pro Se

vs.

Margarita ARELLANO, individually, Julie Beth TODARO, Roberta Ivy SHAFFER, individually, Mary Lynn RICE-LIVELY, individually, John DOE, graduate student, Margaret Ann YACKEY, graduate student, Peter LARSEN, graduate student, Amy FILIATREAU, graduate student, A.J. JOHNSON, graduate student
Respondents,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

APPENDIX

signed

Jose R. Hernandez
Pro Se PETITIONER
231 Wallace Rd
San Antonio, TX 78237-3115
(210) 434-1424
jrhernan2201@gmail.com

Appendix Table

Appendix A.....1A

Panel Opinion of the U.S. Court of Appeals for the Fifth Circuit Affirming dismissal, filed 14 July 2006, unpublished. U.S. App. LEXIS 17875, followed with the DENIAL of En Banc Rehearing filed 9 August 2006.

Appendix B.....8B

Order and Final Judgment of the U.S. District Court, Western District of Texas, Austin Division, Chief Judge Leroy Yeakal granting Defendants' Motion for Dismissal under Rule 12(b)(6) for Failure to State a Claim, filed 1st March 2005 and Denial of Reconsideration of court appointed counsel, and Denial of Plaintiff Hernandez Motion to Disqualify Magistrate Judge Robert Pitman, filed 1st March 2005.

Appendix C.....1C

Report and Recommendations of the Magistrate Judge Pitman recommending Dismissal of Hernandez's Rule 7 Reply Complaint filed 9th August 2004.

Appendix D.....32D

State Texas Statutory Code

Education Code Title I General Provisions Chapter. 1 Sec 1.001 Applicability, 1.002 Equal Education Services or Opportunities (a), Title II Public Education Chapter. 4 Sec. 4.001 Public Education Mission and Objectives, Title 3 Higher Education. (Amended 1995)

(abbreviated paragraphs only)

Appendix E.....34E

Other corroborating material the petitioner believes essential to understand the suit and his Petition.

1) Official Letter from Defendant Respondent Arellano given in person in October 2001 to Hernandez 34E

2) Letter from Office of Civil Rights, US Dept of Education sent in 2002 to Hernandez 36E

3) Email message from witness and grad student Carlos Ovalle, sent to Hernandez in May 2001 .....42E

4) Printed webpage from University's website describing listserv operator's ability to unsubscribe members ...44E

5) Printed webpage from college and University's website giving description of the college listserv 46E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50584
Summary Calendar

D.C. Docket No. 1:03-CV-317-LY

JOSE RENE HERNANDEZ

Plaintiff - Appellant

v.

MARGARITA ARELLANO, Individually; JULIE BETH TODARO; ROBERTA IVY SHAFFER, Individually; MARY LYNN RICE-LIVELY, Individually; JOHN DOE; Graduate Student; MARGARET ANN YACKEY, Graduate Student; PETER LARSEN, Graduate Student; AMY FILIATREAU, Graduate Student; A J JOHNSON, Graduate Student

Defendants – Appellees

Appeal from the United States District Court for the

Western District of Texas, Austin.

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

JUDGMENT

This cause was considered on the record of appeal and the brief on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that the plaintiff – appellant pay to defendants – appellees the costs on

appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

FILED Aug 21 2006 CLERK, U.S. DISTRICT COURT WESTERN DISTRICT OF TEXAS BY s/JK DEPUTY CLERK

A True Copy Attest Clerk, U.S. of Appeals, Fifth Circuit
BY: s/ Joel Rodriguez DEPUTY

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-50584

Summary Calendar

FILED July 14,2006 Charles R. Fulbruge III Clerk

JOSE RENE HERNANDEZ,

Plaintiff-Appellant,

versus

MARGARITA ARELLANO, Individually;

JULIE BETH TODARO; ROBERTA

IVY SHAFFER, Individually;

MARY LYNN RICE-LIVELY, Individually;

JOHN DOE, Graduate Student;

MARGARET ANN YACKEY, Graduate Student;

PETER LARSEN, Graduate Student;

AMY FILIATREAU, Graduate Student;

A J. JOHNSON, Graduate Student,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:03-CV-317

Before BARKSDALE, STEWART and CLEMENT, Circuit Judges.

PER CURIAM:*

Jose Rene Hernandez filed an action under 42 U.S.C. §§ 1983 and 1985 against current and former administrators and students of the University of Texas arising from their alleged conspiracy to interfere with the proper functioning of his university e-mail account because of his nationality.

The district court granted the defendants' motion to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6). The court also denied Hernandez's motions for appointment of counsel, for leave to file a second amended complaint, for sanctions against defense counsel, and to disqualify the magistrate judge.

Hernandez asserts that the district court erred in granting the defendants' motion to dismiss his First Amendment claims. Hernandez claimed that the defendants violated his rights under tne First Amendment by "violating" his e-mail account in a way that restricted his access to his graduate program's listserv. He conceded in the amended complaint that he did not know who made the alleged change to his email account or how it was done. The conclusory allegations do not state a claim for relief. *See Chiras v. Miller*, 432 F.3d 606, 611 (5th Cir. 2005).

Next Hernandez asserts that the district court

erred by denying his motion for leave to file a second amended complaint after the magistrate judge determined that his case should be dismissed.

The district court denied the motion on the basis that Hernandez had failed to take advantage of a previous opportunity to amend his complaint. The court did not abuse its discretion. *See Quintanilla v. Texas Television Inc.*, 139 F.3d 494, 499 (5th Cir. 1998).

Hernandez also argues that the district court erred in refusing to appoint counsel. The district court considered each of the four factors listed in *Jackson v. Dallas Police Department*, 811 F.2d 260, 261-62 (5th Cir. 1986), for determining whether appointment of counsel is appropriate. It concluded (1) the case was not complex; (2) Hernandez had not shown he was unable to present his claims; (3) he seemed capable of understanding the federal rules governing discovery; and (4) he failed to show that the case would present a large amount of conflicting testimony, and his admission into graduate school reflected his intellectual abilities. Accordingly, the court did not abuse its discretion. *See id.*

Next Hernandez asserts that the district court erred in failing to order the magistrate judge to answer Hernandez's motion to disqualify him. This issue is frivolous; there is no requirement that the magistrate judge respond to a motion for disqualification. See 28 U.S.C. § 455; *Liteky v. United States*, 510 U.S. 540, 541-56 (1994). Moreover, the district court ruled on the motion.

In addition, Hernandez argues that the district court abused its discretion in denying his motion for sanctions against the defense attorneys under Rule 11. He asserts that the court erred in failing to investigate and adequately explain whether sanctions were proper. Due to the nature of the outlandish accusations in

Hernandez's motion, the district court did not abuse its discretion. *See Friends for Am. Free Enter. Ass'n v. Wal-Mart*, 284 F.3d 575, 577-78 (5th Cir. 2002).

Finally, Hernandez asserts two other issues in the Statement of Issues in his brief that he does not include in the body of the brief: that the district court erred in failing to consider documents attached to his complaint in ruling on the 12(b)(6) motion and that the court erred in limiting discovery and failing to supervise a pre-trial conference. Hernandez waived these issues by his failure to brief them. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

AFFIRMED.

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50584

FILED AUG 09 2006
CHARLES R. FULBRUGEIII, CLERK

JOSE RENE HERNANDEZ

Plaintiff – Appellant

v.

MARGARITA ARELLANO, Individually; JULIE BETH TODARO; ROBERTA IVY SHAFFER, Individually; MARY LYNN RICE-LIVELY, Individually; JOHN DOE, Graduate Student; MARGARET ANN YACKEY, Graduate Student; PETER LARSEN, Graduate Student; AMY FILIATREAU, Graduate Student; A J JOHNSON, Graduate Student

Defendants – Appellees

Appeal from the United States District Court for the Western District of Texas, Austin

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 7/14/06, 5 Cir., ____, _____ F. 3d _____)

Before BARKSDALE, STEWART and CLEMENT, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. App. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Carl E Stewart

United States Circuit Judge

REHG-4A

Appendix B.....

Order and Final Judgment of the U.S. District Court, Western District of Texas, Austin Division, Chief Judge Leroy Yeakal granting Defendants' Motion for Dismissal under Rule 12(b)(6) for Failure to State a Claim, filed 1st March 2005 and Denial of Reconsideration of court appointed counsel, and Denial of Plaintiff Hernandez Motion to Disqualify Magistrate Judge Robert Pitman, filed 1st March 2005.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed 03/01/2005

JOSE RENE HERNANDEZ	§
PLAINTIFF	§
v.	§
MARGARITA ALLENAO	§
(INDIVIDUALLY), JULIE BETH	§
TORDARO, ROBERTA IVY SHAFFER	§ A03CA317LY
(INDIVIDUALLY), MARY LYNN	§
RICE-LIVELY (INDIVIDUALLY),	§
JOHN DOE (GRADUATE STUDENT),	§
MARGARET YACKEY (GRADUATE	§
STUDENT), PETER LARSEN	§
(GRADUATE STUDENT),	§
AMY FILIATREAU (GRADUATE	§
STUDENT), AJ JOHNSON(GRADUATE STUDENT)	§
DEFENDANTS.	§

ORDER

Before the Court are Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, [n1] Motion to Dismiss filed April 30, 2004 (Doc. #35); Plaintiff Pro Se Hernandez's Opposition Against the Defense Counsel's Motion to

Dismiss under Rule 12(b) and Assertion of Qualified Immunity filed May 11, 2004 (Doc. #38); and Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Reply to Defendants' Motion to Dismiss and Assertion of Qualified Immunity filed May 20, 2004 (Doc. #42). The motion, response and reply were referred to the United States Magistrate Judge for findings and recommendations pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended. The Magistrate Judge file his Report and Recommendation August 9, 2004 (Doc. #44). On August 20, 2004, Plaintiff Hernandez filed his Motion to Opposition and Memorandum to Deny or Vacate the Magistrate's Report to Gran the Dismissal of Plaintiff's Complaint (Doc. #49). He also filed the following motions: (1) Plaintiff Hernandez's Motion to the District Court Petitioning Permission or Leave of the Court to Amend and Supplement his Complaint filed August 20, 2004 (Doc. #47); (2) Motion to Disqualify Magistrate Judge Robert Pitman from Presiding at Proceedings to Filed Cause of Complaint Entitled Above, Pursuant to Title 28 U.S.C. § 455 filed August 9, 2004 (Doc. # 45); (3) Plaintiff Hernandez's Motion for Sanctions Against the Defense Counsel Shelley Dahlberg and Previous Counsel John Grey (Doc. # 53-1) and Request for Oral Hearing (Doc. #53-2) filed October 8, 2004; and (4) Plaintiff Hernandez's Motion to the District Court to Reconsider the Appointment of Counsel filed October 8, 2004 (Doc. #54).

The Magistrate Judge recommended that the Court grant Defendants' motion to dismiss for failure to state a constitutional violation. In light of Plaintiff's objections, the Court must undertake a *de novo* review

of the entire case file in this action. Upon full *de novo* review of the record in this cause and applicable law, the Court finds that the Magistrate Judge's findings and recommendations are proper and should be accepted for the reasons stated therein.

The Court further finds that Plaintiff Hernandez's Motion to the District Court Petitioning Permission or Leave of the Court to Amend and Supplement his Complaint (Doc. #47) should be *denied*. As noted in footnote 4 of the Magistrate Judge's Report and Recommendation (Doc. #44), Plaintiff was afforded an opportunity to correct his pleading deficiencies to no avail. He again fails to show why he should be afforded another opportunity. The Court also finds that Motion to Disqualify Magistrate Judge Robert Pitman from Presiding at Proceedings to Filed Cause of Complaint Entitled Above, Pursuant to Title 28 U.S.C. § 455 (Doc. #45) should be denied. Plaintiff asserts that Judge Pitman and his law clerks are biased, but he provides no evidence other than the Judge Pitman's Report and Recommendation.

In addition, the Court finds that Plaintiff Hernandez's Motion to Sanctions Against the Defense Counsel Shelley Dahlberg and Previous Counsel John Grey (Doc. #53-1) should be denied as counsels' actions as described by Plaintiff in his motion do not rise to the level of sanctionable conduct. Finally, the Court finds that Plaintiff Hernandez's Motion to the District Court to Reconsider the Appointment of Counsel (Doc. #54) should be denied as the Court's review reveals no substantial change in the factors considered by the Court in Plaintiff's previous motion for appointment of counsel.

IT IS THEREFORE ORDERED that the United States Magistrate Judge's Report and Recommendation filed in this cause is hereby

APPROVED and **ACCEPTED** by the Court.

IT IS FURTHER ORDERED that Plaintiff Hernandez's Motion to the District Court Petitioning Permission or Leave of the Court to Amend and Supplement his Complaint filed August 20, 2004 (Doc. #47) is **DENIED**.

IT IS FURTHERED ORDERED that the Motion to Disqualify Magistrate Judge Robert Pitman from Presiding at Proceedings to Filed Cause of Complaint Entitled Above, Pursuant to Title 28 U.S.C. § 455 filed August 9, 2004 (Doc. #45) is **DENIED**.

IT IS FURTHERED ORDERED that Plaintiff Hernandez's Motion to the District Court to Reconsider the Appointment of Counsel filed October 8, 2004 (Doc. # 54) is **DENIED**.

IT IS FURTHERED ORDERED that Plaintiff Hernandez's Motion for Sanctions Against the Defense Counsel Shelley Dahlberg and Previous Counsel John Grey filed October 8, 2004 (Doc. #53-1) is **DENIED.**

IT IS FURTHER ORDERED that the Request for Oral Hearing (Doc. #53-2) filed October 8, 2004 is **DISMISSED AS MOOT**.

IT IS FURTHER ORDERED that Defendants' Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, [Mary Lynn Rice-Lively,] John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Motion to Dismiss filed April 30, 2004 (Doc. #35) is **GRANTED**. All Plaintiff's claims against Defendants are **DISMISSED WITH PREJUDICE**.

IT IS FINALLY ORDERED that all further relief not expressly granted is **DENIED**.

SIGNED THIS _1ST_ day of March, 2005.

s/ Lee Yeakel

LEE YEAKEL

UNITED STATES DISTRICT JUDGE

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1. Defendants' motion to dismiss does not list Defendant Mary Lynn Rice-Lively in the title. However, the body of the motion indicates that she is included as a movant.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed 03/01/2005

JOSE RENE HERNANDEZ	§
PLAINTIFF	§
v.	§
MARGARITA ALLENAO	§
(INDIVIDUALLY), JULIE BETH	§
TORDARO, ROBERTA IVY SHAFFER	§A03CA317LY
(INDIVIDUALLY), MARY LYNN	§
RICE-LIVELY (INDIVIDUALLY),	§
JOHN DOE (GRADUATE STUDENT),	§
MARGARET YACKEY (GRADUATE	§
STUDENT), PETER LARSEN	§
(GRADUATE STUDENT),	§
AMY FILIATREAU (GRADUATE	§
STUDENT), AND AJ JOHNSON	§
(GRADUATE STUDENT),	§
DEFENDANTS.	§

FINAL JUDGMENT

Before the Court is the above entitled cause of action. On this same date this Court signed an order dismissing with prejudice Plaintiff's claims against Defendants. Accordingly, the Court enters the following

Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT ORDERED, ADJUDGED, AND DECREED that Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, [Mary Lynn Rice-Lively,] John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Motion to Dismiss is **GRANTED**. All Plaintiff's claims against Defendants are **DISMISSED WITH PREJUDICE**.

IT IS FURTHERED ORDERED that all relief not expressly granted is hereby **DENIED**.

IT IS FINALLY ORDERED that the case hereby **CLOSED**.

SIGNED this __1st__ day of March, 2005

s/ Lee Yeakel

LEE YEAKAL

UNITED STATES
DISTRICT JUDGE

Appendix C.....

Report and Recommendations of the Magistrate Judge Pitman recommending Dismissal of Hernandez's Rule 7 Reply Complaint filed 9th August 2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed 08/08/2004

JOSE RENE HERNANDEZ	§
Plaintiff	§
v.	§A-03-CA-317 LY
MARGARITA ARELLANO (individually),	§
JULE BETH TODARO, ROBERTA IVY	§
SHAFFER, (individually), MARY LYNN	§
RICE-LIVELY (individually), JOHN DOE	§
(graduate student) MARGARET YACKEY	§
(graduate student), PETER LARSEN	§
(graduate student), AMY FILIATREAU	§
(graduate student), and AJ JOHNSON	§
(graduate student),	§
Defendants.	§

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
CHIEF UNITED STATES DISTRICT JUDGE

Before the Court are Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy

Filiatreau, and AJ Johnson, Motion to Dismiss, filed April 30, 2004 (Clerk's Dkt. #35); Plaintiff Pro Se Hernandez's Opposition Against the Defense Counsel's Motion to Dismiss Under Rule 12(b) and Assertion of Qualified Immunity, filed May 11, 2004 (Clerk's Dkt. #38); and Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Reply to Defendant's Motion to Dismiss and Assertion of Qualified Immunity, filed May 20, 2004 (Clerk's Dkt. #42). The dispositive motion was referred by United States District Judge Lee Yeakal to the undersigned for a Report and Recommendation as to the merits of the motion pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

After reviewing the parties pleadings, relevant case law, as well as the entire case file, the undersigned issued the following Report and Recommendations to the District Court.

I. BACKGROUND

On May 21, 2003 Plaintiff Jose Rene Hernandez ("Hernandez") filed a complaint against Margarita Arellano ("Arellano"), Julie Beth Todaro ("Todaro"), Roberta Ivy Shaffer ("Shaffer"), Mary Lynn Rice-Lively ("Rice-Lively"), John Doe ("Doe"), Margaret Ann Yackey ("Yackey"), Peter Larsen ("Larsen"), Amy Filiatreau ("Filiatreau"), and AJ Johnson ("Johnson"), alleging violations of 42 U.S.C. § 1983 as well as Title VI and Title IX. Plaintiff filed an amended complaint on April 14, 2004. [n1]

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[1] The pleading filed by Plaintiff entitled First Amended Complaint begins with a 38 page introduction section, continues with a 25 page section containing the numbered paragraphs generally found in a

Plaintiff identifies himself as a Hispanic male who was enrolled as a graduate student at the University of Texas Graduate School of Library and Information Science during the spring semester of 2001. (Plf. 1st. Am Compl ¶3.1). He alleges his university-issued email account was "violated and interfered with" in March 2001, without notice or explanation. (Id.). This "violation" resulted in removing or suspending Hernandez' membership in the college-supported listserv "glissa." According to Plaintiff, this listserv functions as an electronic bulletin board, discussion group and information source regarding classes, jobs, deadlines and meetings. (Id.). Plaintiff alleges his consequent inability to both send and receive messages within the college community effectively interfered with his First Amendment rights of free association and communication. (Id.).

Hernandez alleges he "suspected that the change in his email account was accidental but deliberately interfered with or violated but he did not know by whom or how it was done." (Id. ¶ 3.2) Plaintiff reasoned that Associate Dean Rice-Lively, and the technical staff she supervised were the ones responsible for the "violation" of his email account. (Id.). Because he believed the administration of the college would not wish to help him, Hernandez decided to complain to the Office of the Ombudsman at the university on April 24, 2001. (Id.).

Plaintiff alleges Dean Shaffer, Rice-Lively and Todaro colluded together to provide false and

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complaint, and concludes with approximately 50 pages of various attachments. In light of Plaintiff's pro se status, the Magistrate Court will attempt to construe the entire pleading liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 596 (1972) (allegations of pro se complaint held to less stringent standards than formal pleadings drafted by lawyers.)

misleading information to the Ombudsman concerning the violation of his email account. He maintains those defendants provided a variety of explanations for the account interference, misstated university policy, denied knowledge of the misconduct and falsely stated the technical staff was unable to restore his account. (Id.). Hernandez claims these actions were a violation of his "due process right to receive his education without being subjected to a hostile environment, subjected to discrimination and a discriminatory effect." (Id.). He further asserts the actions of the defendants in deliberately denying him a reasonable opportunity to resolve his situation was a denial of his rights under Title IX because he was not treated the same as other similarly situated individuals. (Id.).

Hernandez further alleges that Rice-Lively, in retaliation for his filing a complaint, somehow removed or suspended his membership in the mentoring listserv for the last month of the 2001 spring semester. (Id. ¶ 3.3) In addition, Plaintiff maintains Shaffer, Rice-Lively and Todaro conspired together to intimidate college members from helping him, and misrepresented that he was accusing a technical staff member of violating his email account. (Id. ¶¶3.3-3.4). He also claims Todaro impersonated her own sister in an attempt to interfere with Plaintiff's ability to settle this dispute. (Id. ¶3.7).

Plaintiff alleges that, during a meeting on May 22, 2001, Associate Dean of Students Arellano threatened him "with a lack of references for employment and career ramifications." (Id. ¶3.8). The following day Arellano informed Hernandez that she would not forward his request for an apology. Arellano further instructed Plaintiff that he would no longer receive any assistance from her or her office, or from the Office of the Ombudsman, and was barred from discussing his complaint with anyone from the graduate college. (Id. ¶3.10).

On May 28, Plaintiff emailed a description of his situation to the entire college community (Id. ¶3.11). In response, Shaffer contacted Plaintiff's cousin, a licensed attorney. Hernandez states he had falsely told Arellano that his cousin was providing him legal advice. Shaffer did not attempt to resolve the situation, but instead informed Plaintiff's cousin that the university was threatening legal action. Plaintiff maintains that, during the contact, Shaffer gained slanderous personal information regarding his past activities and family history. (Id. ¶3.12).

Hernandez also states his belief that Rice-Lively, Shaffer and Todaro somehow colluded with Defendant Doe to intercept and delete all of Plaintiff's email messages to his college email account for an entire week in June 2001. He maintains the deletion was done in retaliation for his exercise of his civil rights and was also intended to delete any helpful information provided to him regarding his situation. Plaintiff believes some of the messages may also have been responsive to pending employment applications. (Id. ¶3.13).

Plaintiff further states he attended a meeting with Arellano in October 2001 to request documentation of his complaint. According to him, the documentation he received was wholly incomplete and inaccurate. (Id. ¶3.14). Hernandez complains that, during the meeting, Arellano denied ever having dissuaded him from proceeding with his complaint. (Id. ¶3.15). He also believes Arellano permitted Todaro and Shaffer to listen to the meeting telephonically without his permission or prior knowledge. (Id. ¶3.16) Plaintiff additionally accuses Arellano of failing to inform him of the grievance procedures so he could have his complaint classified as a "formal complaint." (Id. ¶4.4).

Hernandez alleges Todaro and Shaffer continued to stalk and harass him during his employment with

the Pflugerville Public Library. According to Plaintiff, Todaro paid the library's computer consultant to place child pornography on Plaintiff's assigned computer and email account (Id. ¶ 3.17). He maintains that Shaffer informed the library board of his personal problems and prior access to pornography. (Id.). Hernandez further accuses Todaro and Shaffer of accessing his tax returns, monitoring his credit card purchases, retrieving his cell phone records, tracking his employment through driver's license records, and employing private investigators to stalk and harass him at his home. (Id. ¶ 3.18). He also alleges the two have enlisted certain librarians to monitor his library use and recruited other to make anonymous phone calls to his home. (Id. ¶3.19).

Hernandez asserts a number of claims based on these alleged facts. Specifically, he claims: (1) his First and Fourteenth Amendment rights of free speech, due process and equal protection were violated by the actions of Defendants; (2) Arellano denied his right to be enrolled in a public educational institution free from discrimination under both Title VI and Title IX; (3) Arellano cause the other defendants to subject him to abuse and discrimination; and (4) Shaffer, Todaro and Arellano conspired together to retaliate against him for exercising his rights to free speech, freedom of association, due process and equal protection.

Defendants have now filled a motion to dismiss Hernandez' complaint. They ague that : (1) Plaintiff has failed to allege that Doe, Yackey, Larsen, Filiatreau and Johnson are state actors; (2) Hernandez has failed to sufficiently allege a constitutional violation; (3) Plaintiff cannot recover under either Title VI or Title IX; and (4) they are entitled to qualified immunity. The parties have fully briefed the issues and this matter is now ripe for determination.

II. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997) (quoting *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir.1982)). The complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 1161 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). The Supreme Court reminded lower courts that, in order to survive a motion to dismiss, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema N.A.* 534 U.S. 506, 122 S.Ct. 922, 998 (2002) (quoting FED. R.CIV.P. 8 (a)(2)). Thus, a plaintiff is generally not required to plead facts supporting each and every element of his claim or legal theory. Id. Rather, a complaint is sufficient if it "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rest." Id. (quoting *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 103 (1957)). Dismissal is warranted only if "it appears beyond doubt that the plaintiff can prove no se of facts in support of his claim which would entitle him to relief. " *Conley*, 355 U.S. at 4-46, 78 S.Ct. at 102

III. ANALYSIS

A. Civil Rights Claims

Defendants first assert that Plaintiff's claims against Doe, Yackey, Larsen, Filiatreau and Johnson should be dismissed because he failed to allege they are state actors. In order to maintain a cause of action under for violation of civil rights under 42 U.S.C. § 1983, a plaintiff must show that he has been deprived of a federally protected right by a person acting "under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108

S.Ct. 2250 2255 (1988). Plaintiff identifies Doe, Yackey, Larsen, Filiatreau and Johnson as graduate students. In his complaint he asserts all the defendants "are or have claimed to be public officials." (Plf. 1st. Am. Compl. Intro. at 1). Although the complaint does not explicitly state so, it appears that these students worked in some capacity related to the graduate school computer facilities. Plaintiff believes the graduate students acted on behalf of the University of Texas. Liberally construed, this is sufficient to defeat the motion to dismiss on this basis.

Defendants also argue Plaintiff has failed to identify a constitutional violation. They maintain he has not demonstrated he has a constitutional or statutory right to a university-issued email account. (Def. Mot. At 3). This argument reflects a misunderstanding of the nature of Plaintiff's complaint, however. Plaintiff is alleging that the "violation" of his email account interfered with his ability to communicate within the college community. He contends this is a violation of his First Amendment rights. Hernandez also claims the infirmities in the subsequent investigation into the cause of the violation resulted in an equal protection violation and deprivation of his due process rights.

The First Amendment of the Constitution declares that "Congress shall make not law... abridging the freedom of speech." U.S. Const., amend. I. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S.Ct. 2510, 2516 (1995). *See also Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 641-42, 114 S.Ct. 2445, 2458-59 (1994) (discrimination against speech because of its message presumptively unconstitutional); *Hobbs v. Hawkins*, 968 F. 2d 471, 481 (5th Cir. 1992) (viewpoint discrimination violates First

Amendment regardless of forum's classification). Here, Plaintiff alleges his email account was "violated," causing an interference with his ability to communicate with the college community. Interference with the speech of a particular speaker is an implicit discrimination based on the speaker's viewpoint. *See Giebel v. Sylvester*, 244 F. 3d 1182, 1188 (9th Cir. 2001) (actions of professor at state university in tearing down handbills posted on university bulletin boards publicizing former colleague's appearance at upcoming conference were viewpoint-discriminatory because the professor "south to silence speech by a particular speaker"). Accordingly, the Magistrate Court concludes Plaintiff had identified a constitutional violation under the First Amendment. [n2]

This does not end the inquiry. To state a claim for relief against the named defendants, a plaintiff must provide sufficient allegations to connect the defendants to the violation. Here, Plaintiff merely alleges globally that his email account was "violated." At no point in his complaint, however, does he make any specific allegations which identify who committed the "violation," when precisely the "violation" occurred, how the "violation" occurred, or even what the precise nature of the "violation" was. Hernandez has, therefore, failed

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[2] The Magistrate Court notes, however, that Hernandez indicates in his complaint that users with private email accounts were also able to send and receive communications within the college community, as well as access the listserv. (Plf. 1st Am. Compl. Into. At 16 & 18). Indeed, Plaintiff himself states he was able to send a message to the college community from an internet email account. (Id. ¶ 3.11). His assertion that "violation" of his university-issued email account constituted a First Amendment violation is, therefore, somewhat suspect.

to state factual allegations against Defendants sufficient to support a claim of a First Amendment violation. [n3]

Plaintiff further alleges globally that the "violation" of his email account, and the subsequent refusal to deal with his complaint or provide him assistance in investigating the "violation," constitute an equal protection violation. Once again, however, he does not make any specific factual allegations which identify either the responsible defendants or their purportedly improper acts.

Further, as Hernandez recognizes, the basic precept of the Equal Protection clause is the requirement that similarly situated persons receive equal treatment. *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir. 1999) (Equal Protection clause essentially directs that all persons similarly situated be treated alike.) Nonetheless, Plaintiff fails to make any allegations evidencing such unequal treatment. Rather, he contends that he "does not have to provide proof of any king that other students who might have had their email accounts violated would receive better treatment" because he is a "class of one." (Plf. 1st Am. Compl. Intro. at 24). The Equal Protection clause can give rise to a cause of action on behalf of a "class of one," even when the plaintiff does not allege membership in a protected class or group. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074-75 (2000). However, to

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[3] The Court recognizes that Plaintiff has made a significant number of additional accusations of wrongful conduct on the part of Shaffer, including permitting censorship of email messages. However, he has failed to make nay allegations that these wrongful acts were ever directed at, or affected him. (Plf. 1st Am. Compl. Intro. at 6). They cannot therefore, support a claim for relief on his behalf.

state a claim sufficient for relief, the single plaintiff must still allege that he received intentionally different treatment from others similarly situated. Id. Plaintiff has not met this standard. His equal protection claim should, therefore, be dismissed.

Nor has Plaintiff stated a viable due process claim. The Fourteenth Amendment forbids government conduct that deprives "any person of life, liberty, or property without due process of law." U.S. Const., amend. IV. "Procedural due process considers not the justice of deprivation, but only the means by which the deprivation was effected." *Caine v. Hardy,* 943 F.2d 1406, 1411 (5th Cir. 1991). Substantive due process "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 1066 (1992).

Plaintiff here has not specifically identified which type of claim he is attempting to assert. The Magistrate Court has already concluded Hernandez's allegations concerning the "violation" of his email account do not sufficiently state a First Amendment claim. Thus, any attempt to assert a general substantive due process claim based on the alleged "violation' of his email account would also fail. *See Finch v. Fort Bend Indep. Sch. Dist.* 333 F.3d 555, 563 (5th Cir. 2003) (substantive due process claim based on First Amendment claims stand or falls based on merits of First Amendment argument); *Canady v. Bossier Parish Scholl Bd.*, 240 F. 3d 437, 444 (5th Cir.) (court need not address general substantive due process claim because First Amendment provided adequate source of constitutional protection for claim arising from school dress code restrictions.) *See also Boroff v. Van Wert City Bd of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (substantive due process should not be used as a fallback argument when First Amendment directly addresses the subject).

The Magistrate Court notes that a significant portion of Plaintiff's complaint is devoted to allegations of the improper and inadequate reactions of Arellano, Shaffer and Rice Lively in addressing his complaint regarding the "violation" of his email account. Liberally construed, these allegations may be Hernandez' attempt to assert a procedural due process claim based on a deprivation of a proper complaint and investigative process. However, Plaintiff has failed to connect these allegations to any constitutional deprivation. His due process claim fails on this basis alone. *See Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705 (1972) (requirement of procedural due process apply only to deprivation of interests encompassed by Fourteenth Amendment).

Moreover, Hernandez does not complain that his complaint failed to receive attention. The essential requirement of procedural due process under the Constitution are notice and an opportunity to respond. *Cleveland Bd of Educ. V. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985). It is clear that Plaintiff was able to invoke the assistance of the Office of the Ombudsman for the university, as well as obtain meetings with various officials regarding his complaint. The fact that he was unhappy with the resolution of his complaint does not negate his receipt of process. *See Finch*, 333 F.3d at 562 (procedural due process satisfied where plaintiff met with officials prior to action, received written notice of reasons for action, was informed of opportunity to use grievance process, and availed herself of grievance process).

Plaintiff also complains that Arellano caused the other defendants to subject him to various forms of abuse and discrimination. Once again, his allegations are not factually specific as to the improper acts committed. More basically, however, Hernandez has not shown how this purported abuse or discrimination

constituted a violation of a constitutional protected right. His allegations, therefore, fail to state an actionable civil rights claim.

Hernandez further maintains that Shaffer, Todaro and Arellano conspired together to retaliate against him for exercising his constitutional rights to free speech, freedom of association, due process and equal protection. To prevail on a claim for retaliation, the plaintiff must establish (1) a specific constitutional right; (2) the defendant's intent to retaliate against the plaintiff for exercising that right; (3) a retaliatory adverse act; and (4) a casual showing that, but for the retaliatory motive, the incident complained of would not have occurred. *McDonald v. Steward*, 132 F.3d 225, 231 (5th Cir. 1998). The plaintiff must, however, allege more than just his personal belief that he is the victim of retaliation. *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997). *See also Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995) (mere conclusionary allegations of retaliation not enough to withstand motion to dismiss). Rather, he must produce direct evidence of motivation or "allege a chronology of events from which retaliation may plausibly be inferred." *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999). Plaintiff has wholly failed to meet this standard. He presents not a single factual allegation which would evidence an improper motivation on the part of the named defendants, or indeed anything beyond his mere belief that these defendants are responsible for the wrongs allegedly inflicted upon him. Accordingly, the motion to dismiss should be granted as to Plaintiff's civil rights claims. [n4]

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[4] The Magistrate Court recognizes that a plaintiff should generally be permitted an opportunity to provide more detail in an additional pleading. *See Great Plaints Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) (noting general practice in district court of affording plaintiffs at least one opportunity to cure

B. Statutory Claims

Defendants also move to dismiss Plaintiff's claims under Title VI and Title IX as failing to state a cognizable claim against them.

Defendants also move to dismiss Plaintiff's claims under Title VI and Title IX as failing to state a cognizable claim against them. Under Title IX no person may be excluded from participation in, denied the benefits of, or subjected to discrimination under any education program on the basis of sex. 20 U.S.C. ¶ 1681. Title VI includes the same prohibition on conduct based on race, color, or national origin, as to any federally funded program. 42 U.S.C. ¶2000d.

Although the Fifth Circuit has not yet spoken on the issue, a number of courts have concluded Title IX provides for suit against institutions, not against individual defendants. *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999); *Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014, 1019 (7th Cir. 1997); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988);*Goins v. Hitchcock I.S.D.*, 191 F. Supp. 2d 860, 869 (S.D. Tex. 2002);*Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947, 953 (W.D. Tex.

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pleading deficiencies before dismissing a case). The sufficiency of Plaintiff's pleading was, however, examined prior to the filing of Defendants' motion to dismiss. In ruling on Defendants' request to have Plaintiff file a Rule 7(a) reply addressing qualified immunity, the undersigned found that Plaintiff had not alleged sufficient facts to overcome the defense of qualified immunity, but had made only global, conclusory assertions against the defendants without specifying how each was personally involved. (ORDER 3/16/2004). Plaintiff filed his First Amended Complaint in response to that order. He has, therefore, already been afforded one opportunity to correct his pleading deficiencies, to no avail. He has failed to show why he should be afforded a second such opportunity.

1995); *Bowers v. Baylor Univ.*, 862 F. Supp. 142, 145-46 (W.D. Tex.1994). Courts have similarly concluded an action under Title VI is not properly brought against individual defendants. *Shotz v. City of Plantation*, 344 F. 3d 1161, 1171 (11th Cir. 2003) (beyond question that individuals are not liable under Title VI); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 (6th Cir. 1996) (Title VI claim fails because asserted against individuals, not school), *Simms v. Unified Gov't of Wyandotte County/ Kansas City*, 120 F.Supp. 2d 938, 954 (D. Kan. 2000); *Farmer v. Ramsay*, 41 F.Supp. 2d 587, 592 (D. Md. 1999): *Jackson v. Katy Indep. Sch. Dist.*, 951 F.Supp. 1293, 1298 (S.D. Tex. 1999). As Plaintiff has asserted his Title VI and Title IX claims soley against individuals, the Magistrate Court recommends those claims be dismissed.

C. Qualified Immunity

Finally, Defendants maintain they are entitled to qualified immunity from suit. To prevail in a § 1983 suit, a plaintiff must overcome an official's defense of qualified immunity. *Williams v. Kaufman County*, 352 F.3d 994, 1002 (5th Cir. 2003). To determine whether relief is appropriate the court must undertake a two-step analysis. First, the court must evaluate whether a "plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S.Ct. 2508, 2514 (2002) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156 (2001)). If not, the officer is entitled to qualified immunity, and the court need not continue to the second step of the analysis. *Chavez v. Martinez*, 538 U.S. 760, 766, 123 S.Ct. 1994, 2000 (2003).

If a constitutional violation if found to have occurred, the court must determine whether the defendant's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have know." *Hope*, 536 U.S. at 739, 122 S.Ct. at 2515 (quoting *Harlow v. Fitzgerald*, 457 U.S.

800, 818, 102 S.Ct. 2727, 2738 (1982)). The contours of the right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful....but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id. (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987)). An official's conduct is therefore objectively reasonable unless "all reasonable officials would have realized the particular challenged conduct violated the constitutional provisions sued on." *Wooley v. City of Baton Rouge*, 211 F. 3d 913, 918-19 (5th Cir. 2000).

The Magistrate Court has already concluded that Plaintiff's allegations have failed to state a constitutional violation. Defendants are, therefore, entitled to qualified immunity as to Plaintiff's civil rights claims. *See Saucier*, 533 U.S. at 201, 121 S.Ct. at 2156 (if no constitutional right was violated, there is no necessity for further inquires concerning qualified immunity); *Price v. Roark*, 256 F.3d 364, 369 (5th Cir. 2001) (if the allegations do not establish the violation of a constitutional right, the official is entitled to qualified immunity).

III. RECOMMENDATION

The undersigned **RECOMMENDS** that the District Court **GRANT** Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Motion to Dismiss (Clerk's Dkt. #35).

IV. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must

specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. See 28 U.S.C. § 636 (b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S.Ct. 466, 472-74 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

The Clerk is directed to send a copy of this Report and Recommendation to the parties by certified mail, return receipt requested.

SIGNED this __6th__ day of August, 2004.

s/ Robert Pitman

ROBERT PITMAN

UNITED STATES MAGISTRATE JUDGE

Appendix D.....

State Texas Statutory Code

Education Code.

Title I General Provisions Chapter. 1 Sec 1.001 Applicability, 1.002 Equal Education Services or Opportunities (a), ...32D

Title II Public Education Chapter. 4 Sec. 4.001 Public Education Mission and Objectives, Title 3 Higher Education. (Amended 1995) 33D

(abbreviated paragraphs only)

Online; http://tlo2.tlc.state.tx.us.statutes/ed.toc.htm

EDUCATION CODE

TITLE 1. GENERAL PROVISIONS

CHAPTER 1. GENERAL PROVISIONS

Sec. 1001. APPLICABILITY. (a) This code applies to all educational institutions supported in whole or in part by state tax funds unless specifically excluded by this code.

(b) Except as provided by Chapter 18, Chapter 19, Subchapter A, Chapter 29, or Subchapter E, Chapter 30, this code does not apply to students, facilities, or programs under the jurisdiction of the Department of Aging and Disability Services, the Department of State Health Services, the Health and Human Services Commission, the Texas Youth Commission, the Texas Department of Criminal Justice, a Job Corps program operated by or under contract with the United States Department of Labor, or any juvenile probation agency.

Added by Acts 1995, 74th Leg., ch. 260, Sec. 1, eff. May 30, 1995.

Amended by Acts 2005, 79 th Leg., ch 377, Sec. 2, eff. June 17, 2005.

Sec. 1.002. EQUAL EDUCATIONAL SERVICES OR OPPORTUNITIES. (a) An educational institution undertaking to provide education, services, or activities to any individual within the jurisdiction or geographical boundaries of the educational institutions shall provide equal opportunities to all individuals within its jurisdiction or geographical boundaries pursuant to this code.

TITLE 2. PUBLIC EDUCATION

SUBTITLE A. GENERAL PROVISIONS

CHAPTER 4. PUBLIC EDUCATION MISSION, OBJECTIVES, AND GOALS

Sec. 4.001. PUBLIC EDUCATION MISSION AND OBJECTIVES. (a) The mission of the public education system o this state is to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. That mission is grounded on the conviction that a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens. Its is further grounded on the conviction that a successful public education system is directly related to a strong, dedicated, and supportive family and that parental involvement in the school is essential for the maximum educational achievement of a child.

Appendix E.....

Other corroborating material the petitioner believes essential to understand the suit and his Petition.

1) Official Letter from Defendant Respondent Arellano given in person in October 2001 to Petitioner Hernandez.....34E

2) Letter from Office of Civil Rights, US Dept of Education sent in 2002 to Hernandez.....36E

3) Email message from witness and grad student Carlos Ovalle, sent to Hernandez in May 2001.....42E

4) Printed webpage from University's website describing listserv operator's ability to unsubscribe members 44E

5) Printed webpage from University's website giving description of the college listserv in question....46E

OFFICE OF THE DEAN OF STUDENTS
THE UNIVERSITY OF TEXAS AT AUSTIN

October 22, 2001

Joe Hernandez
P.O. Box 7491
Austin, TX 78713

Dear Joe,

You first came to see me on May 1st because you had a complaint about being dropped from a list serve in the School of Library Science. You also told me that the Ombudsman's Office did not take your case because you had not contacted the individuals involved and you needed to do this before using their services. The Ombudsman's Office was willing to help you but only until after you had discussed this matter with faculty/ staff in your Department. It is my understanding that you came to my office because I over see the Office of the Ombudsman and you wanted me to do something about it. I explained to you that my relationship with that office is one where I serve as an administrative mentor since they are an independent office who report directly to the President.

I offered to assist you to get in touch with D. Roberta

Shaffer, Dean of the Graduate School of Library Science, since you had never met with her to discuss your concerns. I talked to the Dean on your behalf and she agreed to meet with you and discuss this matter. I know you met sometime in the early part of the summer but I found out based on your emails you sent me that her explanations were not to your satisfaction.

Unfortunately, there is nothing else I can do for you because that matter has to be resolved with the Graduate School of Library Science. One recommendation that I would like to give you is to please contact the students who manage the list serve in question and bring up your concerns.

Sincerely,

s/ Margarita M. Arellano

Margarita M Arellano
Associate Dean of Students
Retention Services

P.S. I am enclosing copies of emails that I sent or received from you.

UNITED STATE DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION, DALLAS OFFICE
OCT 02 2002

Ref: 06022016

06022036

Mr. Jose Hernandez
231 Wallace Road.
San Antonio, Texas 78237-3115

Dear Mr. Hernandez:

This letter is in response to your electronic mail (e-mail) correspondence, date September 2, 2002, regarding the processing of the above referenced complaints you filed with the U.S. Department of Education, Office for Civil Rights (OCR), Southern Division, Dallas Office. In these complaints, you alleged that the University of Texas at Austin (UT), Austin, Texas, Graduate School of Library and Information Science (GSLIS) discriminated against you, on the basis of race and sex, Hispanic male, in violation of Title VI of the Civil Rights of 1964 and Title IX of the Education Amendments of 1972. Specifically, you allege that UT altered or tampered with your college e-mail account and removed you from the college "listserv" without due process on the bases of your race and sex. In addition, you alleged that in May 2001

officials in the GSLIS retaliated against you for attempting to protect your civil rights. In this e-mail correspondence, you are again raising the same or similar concerns regarding the processing of you complaint with this Office ând requesting that your complaints be addressed with the U.S. Department of Justice, Civil Rights Division. We have reviewed al the actions taken by the OCR in processing your various complaints and have summarized them as following.

You filed your initial complaint (#06022016) with the Dallas OCR Office on November 27, 2001. In this complaint, you alleged that UT discriminated against you, by deliberately tampering with your e-mail listserv account so as to remove you from the UT/college listserv as well as deleting a weeks worth of your college e-mail before you could retrieve it and also for removing your membership from a second college listserv. On the OCR Internet Complaint Form that you e-mailed to our Office, the you stated that the "discrimination was either for race or sex." However, the information you provided did not support your contention that race or sex was a factor in the alleged discriminatory actions taken against you.

In order to clarify this complaint, OCR staff spoke with you in a telephone conference and reviewed subsequent e-mails you submitted after OCR opened the complaint. In this conversation with OCR and throughout your e-mails, you stated that you believed that the alleged discriminating officials took offense to statement you made in your e-mail postings on the listserv and viewed you e-mail postings as an opportunity to exclude you from UT. You also indicated that you believe that UT

had a pattern of abusing students' concerns. After explaining to you the laws and regulations that OCR enforces you were asked why you believed that alleged discrimination against you was based on your race and sex. You stated that because you are a Hispanic male and the persons who allegedly altered your e-mail account were white females, you felt that this was obviously discrimination on the basis of race and sex. You provided no other information to support your contention that race or sex was a factor in the actions of which you complained. You also provided information indicating that UT also denied another graduate student (white male) access to college listserv in an attempt to censor that person because he criticized a professor. After considering all the information you provided, we determined that you failed to provide sufficient information to establish a factual basis for you belief that discrimination, on the basis of race or sex, had occurred. Based on this information, we administratively closed this complaint on February 6, 2002.

On February 12, 2002, OCR received e-mail correspondence from you requesting OCR to reconsider its decision to close your complain; however, before OCR had an opportunity to respond to your request, you filed a second complaint with OCR on February 14, 2002. OCR addressed your requests to reconsider the closure of the first complaint by opening the second complaint. This new complaint provided more detailed information regarding the nature of your allegations of alleged discrimination and retaliation and included matter not previously raised in your first complaint. In your second complaint, you stated that the actions taken against you were because you "upset someone" and the UT officials who took the actions were done by persons who bore a "personal grudge" against you. You further state that

you felt the UT officials who allegedly discriminated against you had the technical expertise to violate your e-mail account. In reviewing the second complaint, we determined that you failed to provide sufficient information to establish a factual basis for your belief with the processing of this complaint. As a result, OCR administratively closed this complaint on March 14, 2002.

OCR received correspondence from you dated March 24, 2002, requesting that I review the decision to administratively close your second complaint. In a letter dated April 22, 2002, the Dallas Office responded to your March 24, 2002, letter. You were advised that your information had been thoroughly reviewed and considered and the decision not to proceed with the processing of your complaints was in accordance with OCR's case processing procedures.

Finally, from the details provided by you in your latest e-mail correspondence to this Office on September 2, 2002, a thorough review shows similar reiterations of the details that surround the alleged facts of discrimination taken against you that you have outlined in your previous complaints. Again, you have raise similar objections to the way this Office has responded to you and handled your complaints; however, you still have not proffered the necessary factual basis for your belief that any acts were done to you by UT on the basis of civil rights protected statutes and regulations enforced by this Office. Therefore, the handling of your complaints by this Office and the staff of this Office have been in accordance with our case processing procedures.

In summary, based upon a thorough review of the complaints files and the information that you provided in your e-mail of September 2, 2002, to support your request that our Office review it's decisions to close those complaints does not warrant a change in the determination made by OCR. Therefore, I have concluded that the processing of your complaints by the staff of this Office has been conducted in accordance with the OCR case processing procedures.

With respect to your request to forward the contents of the above referenced complaint files to the U. S. Department of Justice, we are providing you with the address of that agency. If you wish to pursue this matter further, you can contact the agency at the following address for whatever action they deem appropriate:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Educational Opportunities Section PBH
Washington, D.C., 20530

If after receiving this letter, you continue to have concerns regarding the processing of your complaints, those concerns may be raised with the Deputy Assistant Secretary for Civil Rights (DAS). The DAS will review my response to your concerns to ensure that our Office was responsive and that decisions were made in conformance with the laws and regulations enforced by OCR. A request for the DAS to review the decisions of the Director should be made, in writing to:

Deputy Assistant Secretary for Civil Rights
U.S. Department of Education

Office for Civil Rights
Mary E. Switzer Building
330 C Street
Washington, D.C. 20202

Please be aware that your request should address, with as much specificity as possible, the factual or legal questions that would change the determination regarding the complaints. The DAS will issue a final agency determination on behalf of the U.S. Department of Education. This is the final step in the complaint review process. There is no further administrative review of case determinations within the U.S. Department of Education.

If you have any questions or concerns regarding this letter, please contact our Office at (214) 880-2463.

Sincerely,

s/ Taylor D. August

Taylor D. August, Director
Office for Civil Rights
Southern Division Dallas Office
1999 BRYAN STREET, SUITE2600, DALLAS, TEXAS 75201-6810

Our mission is to ensure equal access to education and to promote educational excellence throughout the nation

Yahoo! Mail

inbox for jrhernan2201@yahoo.com

Date: Mon, 28 May 2001 16:16:01- 0500 (CDT)

From: Carlos Ovalle <cjovalle@gslis.utexas.edu>

To: joe hernandez <jrhernan2201@yahoo.com>

CC: <glissa@lists.cc.utexas.edu>, Mary-Lynn Rice-Lively <marylynn@gslis.utexas.edu>

Subject: Re: A Notion of Virtue and Other Misgivings

I've got a couple of thoughts about this matter. Just for the record, I used to be one of the glissa list operators about a year ago, so I have some idea of how the addition/removal process works.

First, there is on direct connection between the GLISSA list and the school administration. The only people who have authority or ability to add and remove subscriptions fro the glissa list are the glissa listowner, which are usually one or more of the glissa codirectors. Nobody else can do this. The glissa list is not an official school list. The glissa list is for the students, by the students. Faculty, staff, and administration are welcome to post messages to the list, but they have no control over it.

Second- and if this wasn't evident before, it should be after some of the recent posts, there really isn't a set-in-stone policy about what type of posts are allowed on the glissa list. It's pretty much self-regulating, although occasionally a list owner may suggest that a conversation is best taken off of the list.

Third, the only reason people are removed from the glissa list is when they request to be removed or their mailbox is full (which happens fairly regularly). If a recipients mailbox is full, then every message sent to the glissa list that should go to the recipient is bounced back to the listowner with an error message. This quickly fills the listowner's account, so the listowner usually unsubscribes the person after a relatively short time. The glissa listowners don't censor or moderate the list- the list isn't set up that way. It's actually impossible to do so beyond restricting access to the list, which as far as I know has never been done.

My suspicion is that this is what occurred- a full mailbox. It happens all the time. The glissa listowners don't have a way of contacting people when they are removed. If this is in fact what occurred, it should be logged somewhere.

So, my first question is, did you contact the glissa list owner? The GLISSA website and the initial subscription message both mention the contact info there, listown@gslis.utexas.edu.

I can't comment about the other allegations, but there seems to be a great deal of miscommunication involved. I hope everything is resolved satisfactorily

Carlos Ovalle

http://us.f131.mail.yahoo.com/ym/ShowLetter?
Msgid=9151_5882.....6/14/01

UT Austin ACTIS Mailing List Answers- Unexpectedly Unsubscribed

ACITS Mailing Lists- Answers

Why did I get a message saying that my request to unsubscribe to a mailing list was successfully complete? I made no such request.

This can happen in two ways: unintentionally or intentionally.

Unintentionally- -

This covers most circumstances and is usually a result of a list being configured so that users are automatically unsubscribed when attempted mail delivery fails and bounces back to the sender (the list processor). The problem in such instances could be with timing out at some intermediate machine in the delivery routing, or by your host machine being off-line for an extended period.

Whatever the reason, the solution is to subscribe to the list again, just as if it were a new subscription- - see

http://www.utexas.edu/cc/mailinglist/answers/subscribing.html

This way to get back on a mailing list should be tried first. It will usually be successful for open-subscription mailing lists.

Intentionally- -

Occasionally, a list owner will intentionally unsubscribe someone, for reasons related to the administration of the list. In this case, you must request reinstatement from

the list owner. The list owner of any list on the lists.cc.utexas.edu server can be reached by e-mail at

listname- request@lists.cc.utexas.edu

where listname is the actual name of the list. For example, for the "bungeejumpers" mailing list, the owner could reached at

bungeejumpers- request@list.cc.utexas.edu

Mailing List: Introduction Steps Answers

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31 January 2000

ACITS at UT Austin

Comments to : remark@cc.utexas.edu

http://www.utexas.edu/cc/mailinglist/answers/unexpected-unsub.html 5/16/2001

GLISSA: membership and governance

GLISSA

Graduate Library and Information Science Student Association

Membership

If you are enrolled in GSLIS, you are a member already! It's that easy! There are many benefits to membership. Most students begin by signing on to the mailing list. It is a great way- - and, in some cases, the only way- - to stay informed about classes, job and internship opportunities, campus events, administrative deadlines, social gatherings, and professional association meetings.

Governance

The current GLISSA co-directors are:

Margaret Yackey [yackey@mail.utexas.edu]
Peter Larsen [plarsen@gslis.utexas.edu]
Amy Filiatreau [filiatreau@mail.utexas.edu]
AJ Johnson [adrianj@gslis.utexas.edu]

If you are in El Paso or San Antonio and want to be a Student representative, please send email to glissa@gslis.utexas.edu.

http://www.gslis.utexas.edu/~glissa/glissa.html 5/15/01

STUDENT ASSOCIATION OF THE SCHOOL OF INFORMATION (SASI)

Online Organization Registration

Type:

Educational and Departmental Organization

Purpose:

The official purpose is threefold; 1) to serve as a forum to consider matters of professional interest and thus widen the educational horizons of its members; 2) to advance the interests of the student body of the Graduate School of Library Science with the Library School Administration; and 3) to foster a spirit of professional camaraderie and cooperation among its members.

Membership:

1) Must be registered in the UT graduate school and working toward the MLS; 2) taking courses in GSLS towards a provisional librarian certificate; 3) taking at least one course in Library Science.

Functions:

GLISSA is working to building a minority scholarship fund to encourage attendance at the Graduate School of Library Science by minority students. Sandwich seminars enable members to hear about mutual concerns. This organization also encourages participation by its members in local conference through provision of excursion plans.

http://utdirect.utexas.edu/dsorg.wb?code=00186

Phone:

E-mail:

sasi@ischool.utexas.edu

Web Address (URL):

http://www.ischool.utexas.edu/~sasi